United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL
WITH PROOF
OF SERVICE

76-7408

To be argued by
PETER K. LEDWITH

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B

P/S

G. T. FLAMMIA,

Plaintiff-Appellee,

- against -

OSG TAP AND DIE, INC.,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLEE

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SUMMARY OF FACTS

THE AGREEMENT

On May 14, 1973, the executives of defendant OSG and Mr. Flammia agreed that Mr. Flammia would introduce the OSG people to the Mite Corp. executives for the purpose of initiating discussions for the acquisition of the Sossner Company. It was agreed that the acquisition was to be for the benefit of both

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OSG (in acquiring a United States production facility which perfectly suited its needs) and for Flammia (to return to the presidency of the Sossner Company which he developed over a period of twenty-five years under circumstances best suited for Sossner's success, and also Mr. Flammia was to acquire five percent of the ownership of the Sossner Company for an investment of One Hundred Thousand Dollars).

THE WRITINGS

After the agreements were made, Mr. Flammia confirmed the actions he had taken in a letter of May 17, 1973 to OSG. In a letter dated May 24, 1973 to Flammia OSG stated that it received Flammia's letter, acknowledged it, amplified on it, and thanked Mr. Flammia for the services he performed in introducing OSG and MITE. Later, at OSG's request, Flammia prepared a proposal for his compensation at Sossner in a memorandum dated June 12, 1973. A counter proposal was then made by OSG and dated July 3, 1973. During all of these negotiations and exchanges, Flammia suspended his own business doings so as not to "confuse the possible deal".

THE OUTCOME

OSG acquired Sossner on the precise terms Flammia disclosed to them. OSG refused to permit Flammia to invest the One Hundred Thousand Dollars in the acquisition. Flammia was not given the presidency of the company. The original agreement

as to Flammia's compensation was severely diminished by the counter offer of July 3rd. The counter offer, administered by Warren Demery, acting for OSG, was then diminished further and to the extent that the offer became demeaning and totally unacceptable to Mr. Flammia.

THE INJURY AND REMEDY

Having been denied the benefit of his bargain, Flammia brought this action to recover damages for the value of his services to the extent that such services benefited and "enriched" defendant.

Deprived of participation in the acquisition (i.e., the presidency and part ownership of Sossner), plaintiff treated the agreement as rescinded and asked for a quantum meruit recovery.

Since a monetary value cannot be placed on the loss of the right to invest in and to operate a company, plaintiff, having performed, must treat the breached agreement as rescinded and to sue in quantum meruit.

The Statute of Frauds does not apply to such an action.

STATEMENT OF FACTS

A. THE PARTIES

Plaintiff-Appellee, G. T. Flammia, is a resident of New York who was associated with the Sossner Tap and Die Corporation (Sossner) from 1948 to 1973. Mr. Flammia was President of Sossner for the years 1967 through 1973. Defendant-Appellant, OSG Tap and Die, Inc., is a business corporation organized under the laws of the State of Illinois in 1968. It is a wholly-owned subsidiary of a Japanese manufacturer and, commencing in 1968, has distributed in the United States taps and dies made by its Japanese parent. (4TC-9TC).

Former defendant Mite Corporation (MITE) is a Connecticut corporation.

B. PLAINTIFF'S EMPLOYMENT BY SOSSNER

Mr. Flammia was first employed by Sossner in 1948 as the Factory Superintendent and, as such, he "ran the whole show". (136A)

In 1951 or 1952, the Sossner Company ran out of cash -- the company was small and did little business when first started -- so Mr. Flammia loaned the company $5,000 on an interest-free basis to keep it going. When Sossner got on its feet, Flammia took repayment of the $5,000 loan in stock in the

company, thus giving him a ten percent ownership in Sossner. (136A) At that same time he was promoted to the vice-presidency.

When Flammia first came to the company in 1948, Sossner was a small company doing approximately $100,000 in business with twenty-five employees. Flammia's job was to turn the company around and make it a profitable venture. As time went on, the company grew each year and enjoyed good profits (145A)

At about 1951, Mr. Flammia developed a process called Elekra Process and then later one called Elektralube which gave Sossner's tool a very hard surface. This process resulted in Sossner having a unique product which very few tap manufacturing companies have been able to develop. (146A-147A)

Further, Flammia developed a "special geometry" for his tools which further made Sossner's product further unique and resulted in Sossner's securing a very good portion of the aircraft nut manufacturing business. In 1967, when the owner and president, Ted Sossner died, after a year of illness, the Sossner Company had gross sales of two million dollars. During 1966, the time that Mr. Sossner was ill, Mr. Flammia solely was running the business. During that period, the Sossner Company had a thirty-five percent growth of business. (140A)

In 1967, Heli-Coil Corporation expressed an interest in purchasing Sossner from Mr. Sossner's widow who owned fifty-one percent of the company. However, Heli-Coil indicated that it would not purchase Sossner unless Mr. Flammia continued on as President. (138A)

In 1970, the tap industry went into a price war wherein

the proper prices were not being charged for the products manufactured with the result that business stagnated generally. Consequently, there was a sharp leveling off of sales. (314A)

In 1970, Heli-Coil sold Sossner to Mite Corp. which continued Mr. Flammia as President. During the period of 1970-1973, Mr. Flammia was most active in the manufacturing, sales and administration of the Sossner Company with Mite Corp. providing financial and accounting services. (265A)

C. PLAINTIFF'S ATTEMPT TO BUY SOSSNER

In 1972, Flammia prepared plans for the future of Sossner which required additional investments in the subsidiary by Sossner's parent company, more automation and additional product lines. The plans also proposed the acquisition of other companies producing comparable tools. In his discussions with the management of the parent Mite Company plaintiff was unable to persuade them to accept these plans and it became clear that such management was unwilling to invest more than the annual depreciation of Sossner's plant and equipment in each of the succeeding future years. It was plaintiff's opinion that such decision would require Sossner to remain a relatively stagnant company with little possibility for further growth and development.

Accordingly, plaintiff, late in 1972, commenced discussions with the management of the parent company regarding the possible acquisition by him of Sossner. On their recommendation, plaintiff consulted lawyers and accountants

who, after examining the financials of Sossner, recommended that he offer $1,600,000 to such management for Sossner. Management's reply was that the parent company wished to retrieve their investment in Sossner which was an amount slightly in excess of $2,000.000.

Discouraged with this entire situation, plaintiff resigned as president of Sossner effective March 31, 1973.

After his resignation, Flammia contacted three different companies and advised them of the $2 million purchase price of Sossner. Flammia approached these companies not as a finder, but in the hope that they would assist him in a purchase of Sossner (177A, 101T-02T). Two of these companies reviewed the matter and turned the deal down (176A-77A); the third company was still reviewing the matter some months later when Sossner was acquired by OSG (101T-03T).

D. PLAINTIFF'S MEETING WITH OSG

In April of 1973, Mr. Flammia formed his own corporation known as Pioneer Tap Company. (176A) In May of 1973, Flammia went to Chicago to, among other things, visit with defendant OSG to determine whether that company would provide Pioneer with semi-finished tools that Pioneer could finish and brand and then "attack the market". (177A)

During the discussions with the OSG people, Mr. Flammia was told that OSG was the United States sales affiliate of the Japanese parent and that costs in Japan were getting rather

great due to the inflation there and that it was getting almost as cheap to manufacture the products in the United States as to import them from Japan. (180A) Further, Mr. Osawa, the President of OSG, indicated that he was interested in being able to acquire a manufacturing capability which would control about five percent of the tap production market in the United States.

Clearly, since Sossner was a two-million dollar company in the one-hundred-million-dollar United States industry, the percentages were ideally suited for OSG.

Mr. Flammia brought up the subject of the possible availability of Sossner for acquisition. (183A) This opportunity was not generally known since Mite Corp. was not actually seeking a purchaser. Further, Mite wanted to give the new management of Sossner a chance to see what they could do. (192A)

Mr. Flammia felt that a possible acquisition of Sossner by OSG would be advantageous to Sossner and to OSG. OSG would have their domestic source of manufacturing tools as well as an entree into certain types of markets which OSG had told Flammia they had lost. Sossner would have a working relationship with a relatively known, world-wide company which had a reputation of having fine equipment and a fine product. Flammia felt that this would be a beautiful marriage. (184A)

Flammia revealed to OSG that he could have acquired Sossner for the sum of two million dollars. (185A)

Further, Flammia demonstrated that he was instrumental in the growth and development of Sossner, that he had considerable

interest in the company, and that he was willing to invest one hundred thousand dollars of his own money in the acquisition of the company. (348A)

Flammia provided OSG with a very detailed forecast relative to the operation of the company, its technology, its market prospects, its labor force, its financial prospects as well as all of its problems. (349A and 44A)

OSG was interested in the Sossner deal. However, they wanted assurance from Flammia that he would be part of the acquisition as a joint venturer and as a purchaser since OSG didn't have the personnel or management to operate a company in the United States. (Zoppelt deposition page 16)

OSG also wanted a cash involvement from Mr. Flammia as a showing of good faith (Zoppelt deposition page 17) and in that it was OSG policy to allow managers to participate in ownership. (186A) Additionally, OSG wanted Flammia as executive officer. (Zoppelt deposition page 18)

Mr. Flammia himself wanted to be a part owner of Sossner with a personal investment of one hundred thousand dollars (186A) and to resume the presidency of the company.

OSG indicated that with their business relationship, Mr. Flammia's salary would be at least what he had earned at Sossner, and with profit sharing and other fringe benefits, he could potentially earn as much as one hundred thousand dollars yearly.

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For Mr. Flammia's part, he wanted to participate in the acquisition of Sossner with OSG because:

> "It was my great desire to get back with Sossner because of the twenty-five years of work that I had put into it, I had helped it to grow and I felt that working with a cutting tool company of the stature of OSG, and I thought that I would really be able to do the things my company or Sossner could do, and that my basic and primary interest in the whole transaction, that is, just to get back, and to put it into a corny way, to get back with my own wife, it was my baby and I wanted to give it all I could." (316A)

OSG assured Flammia that all would work out well since OSG had all the requirements -- cash and machinery -- to shape Sossner up in precisely the manner Flammia had most desired. (22A)

E. COMMUNICATIONS BETWEEN FLAMMIA AND OSG BETWEEN MAY 14, 1973 AND MAY 24, 1973

On May 14, 1973, Mr. Flammia called Leo Broncato, Mite's Executive Vice-President, to ascertain whether or not Sossner was still available for acquisition. Mr. Broncato stated that Mite was not actively seeking to sell Sossner but that he would mull the idea over. (192A, 392A)

On May 16, 1973, Flammia phoned Broncato and advised him that OSG was the interested party in Sossner. (198A-199A).

On May 17, 1973, Flammia addressed a letter to OSG expressing his role in beginning the Sossner negotiations and expressed his enthusiasm about the merger of OSG and Sossner:

"OSG Tap and Die, Inc.
398 West Wrightwood
Elmhurst, Illinois 60126

Attention: Mr. T. Osawa

Dear Mr. Osawa:

It was a real pleasure to meet and discuss with you and Mr. Zoppelt the possibilities of acquiring Sossner Tool Divion (sic) by OSG.

As you know, I spoke to Mr. Leo Brancato, Executive Vice President of Mite Corporation on Monday, May 14, and told him that I had lined up a possible buyer for the Sossner Division but didn't reveal your company identity.

On Wednesday, May 16, I spoke to Mr. Brancato again and told him that your company (OSG) was the interested party, after my phone conversation with Mr. Zoppelt on Tuesday afternoon, wherein he authorized me to act in your company's behalf.

Mr. Brancato asked for a little time to mull over the offer to buy Sossner - at least this week-end and said that he would get in touch with me.

He did ask for your name and Mr. Zoppelt and I gave the names to him together with your address and telephone number. I imagine that he is going to draw a D & B on your company before he continues any possible negotiations.

I will keep in touch with Mr. Brancato and if I do not hear from him by Wednesday, May 23rd, I will phone him on Thursday, the 24th.

The more I think about the possibilities of the merger of OSG and Sossner, the more enthusiastic I get.

Very truly yours,

G. T. Flammia
3999 Alken Avenue
Seaford, New York 11783"

Express reference to the Osawa letter is made in a signed response from Zoppelt dated May 24, 1973. This critical letter acknowledges plaintiff's initial service and, at its end, invites further action in defendants' behalf.

"Mr. G. T. Flammia
3999 Alken Avenue
Seaford, NY 11783

Dear Gerry:

Thank you for your letter of May 17. I look forward to hearing the results of your further discussions with Mr. Brancato.

* * *

We agree with you and believe that the OSG acquisition of Sossner could be very meaningful. Through our Japan production capabilities, ability to furnish automatic thread and flute grinders, etc., we can turn around and solve the problems you have outlined in your proposal in quick order and make this division a major factor in the US tap market. We believe that we are the only ones capable of doing it because no one has the additional production capability to immediately meet the Sossner need.

Mr. Osaw, Terry's father, will be coming to the United States approximately two weeks from now. When he is here, it would be a good time for us to visit the Sossner facilities and meet with yourself and Mr. Brancato. Prior to his visit, it would be well that we had the balance sheet and operating statement for our study and analysis.

Thank you for making the contact at Sossner and we look forward to hearing the results of your discussion with him on May 23 or 24.

Sincerely yours,

OSG TAP AND DIE, INC.

s/ Robert R. Zoppelt
Robert R. Zoppelt
Vice-President

F. PLAINTIFF'S REQUEST FOR A FINDER'S FEE

On June 4, 1973, Flammia sent a letter to MITE (28A) in which he requested a finder's fee for services he had performed on MITE's behalf (205A). MITE responded by letter dated June 6 (29A) that Flammia had not been authorized to act on its behalf and that it would not pay Flammia a finder's fee. Despite MITE's rejection of his request for a finder's fee, Flammia never asked for a finder's fee from OSG; his expected reward from OSG was that he would become President of Sossner and own a stock interest in it (93A).

G. PLAINTIFF'S PROSPECTIVE EMPLOYMENT

In the May 1973 meetings with OSG, it was agreed that Flammia would become President of Sossner, invest one hundred thousand dollars in a joint venture acquisition with OSG of Sossner, that Sossner would be adequately capitalized with money and machinery so as to meet the highest hopes of Flammia for Sossner's future success.

On June 11 or 12, 1973, Zoppelt and Osawa came to New York to look at the Sossner facility and to discuss the proposed acquisition of Sossner with the MITE executives. (201A) During this trip, Zoppelt met with Flammia and asked him to set forth what kind of employment terms he would propose should Sossner be acquired. (212A) Flammia wrote out his suggested terms in a memo dated June 13, 1973. (34A-37A)

Flammia's memo contained approximately ten suggested items including salary, auto, etc., and a profit-sharing term which stated as follows:

> "Bonus based on profit suggested - fifty percent of profit after taxes after first five percent for company"

Mr. Zoppelt looked at this memo and disagreed with the proposed bonus plan and the question of how Mr. Flammia would finance the one hundred thousand dollar investment. (22A)

Mr. Zoppelt totally misunderstood the idea of the proposed bonus plan (220A) but never asked what was meant by it. (224A) Under the proposed profit-sharing terms, in fact, should the best predictions of Sossner's success in the ensuing three years become fact, Mr. Flammia would have earned no bonus. (212A-220A)

After Mr. Flammia explained what was meant concerning "some sort of special arrangements" relating to his one hundred thousand dollar investment, Mr. Zoppelt just nodded. There were no discussions relative to this matter either. (223A)

The next discussion with Flammia was the following day when Zoppelt told Flammia that he "blew himself out of the ball park". Thereafter, the next discussion with OSG was the 20th of June when Flammia called Zoppelt and asked what was going on. Zoppelt told Flammia that OSG had hired Warren Demery as Executive Vice President.

There were no counter proposals ever made to Mr. Flammia by OSG relative to his operating Sossner before their hiring Demery.

H. ACQUISITION OF SOSSNER

Subsequent to brief negotiations, OSG acquired Sossner from Mite Corp. on August 1, 1973 at a closing which took place in New York City (564A-565A) for the price of Two Million Dollars.

I. FURTHER NEGOTIATIONS WITH PLAINTIFF

In early July 1973, OSG tendered a conditional offer of employment to Mr. Flammia as Vice-President in Charge of Manufacturing with a $30,000 salary plus profit sharing (40A-41A), but this offer was subject to a virtual veto by Demery who now held the position which Mr. Flammia had been promised:

> "The period of this contract, terms and conditions, responsibility, etc., we would like for you to work out with Warren Demery." (40A, paragraph 8)

Mr. Flammia had been offered an eighteen-month contract by Zoppelt when he received the conditional offer. During the discussion with Demery, Demery reduced the contract term to one year. (234A) In that this final indignation was totally unacceptable, Mr. Flammia refused the offer. (273A)

J. QUALIFICATIONS OF EXPERT WITNESSES

At the trial, plairtiff called Dr. Aaron Warner as his expert witness. Dr. Warner is presently Dean of the

Comumbia School of General Studies, who holds an AB Degree from New York University, an LLB Degree from Harvard Law School and a PhD in economics from Columbia and who practiced law in Boston from 1933 to 1936 and then served as a lawyer and an administrator with the National Labor Relations Board, the Railroad Retirement Board and the Office of Price Administrator. After the war he served as Associate Professor at Harvard and thereafter as a full Professor at Columbia with his major fields of interest being economic theory, labor economics and industrial organization. He has also served in many cases as an arbitrator of labor disputes, as a consultant to Federal agencies, including the Department of Labor, the Maritime Administration and the Department of Commerce, as a consultant to the International Labor Organization at Geneva, Switzerland, and as an associate with an economic consulting firm which specializes in the evaluation of human services. He testified that his competency as a teacher includes the field of mergers and acquisitions and that he serves as a labor economist and an arbitrator. (600A)

Whereas, defendant OSG called Mr. Alan Sternlieb, who was Managing Director of the investment banking firm of Lehman Brothers, who has "spent a good deal of time in the area of mergers and acquisitions". (602A)

K. EXPERT OPINIONS AS TO VALUE

Dr. Warner testified that, in his opinion, Flammia's services were worth $190,000 to OSG, broken down as follows:

a. $90,000 saving the necessity of broker's or finder's fee (346A) which inured to the benefit of OSG calculated at 5% of the 1st million and 4% of 2nd million.

b. $30,000 minimum for revealing the precise figure for which Sossner could have been purchased which information saved OSG from paying a "premium" which might have varied from five percent to twenty percent of the purchase price of Two Million Dollars.

c. $20,000 minimum for Flammia's revealing the availability of a perfectly suited company for OSG which resulted in a quick, inexpensive closing by OSG and a great saving of executive time and expense.

d. $50,000 for the unique information provided by Mr. Flammia to OSG relative to Sossner, its growth and development, the detailed descriptions of Sossner's operations, its technology, its market prospects, its labor force, its financial prospects, in addition, Flammia's interest in the company and his willingness to invest his own money provided OSG with confidence in the acquisition and removed the considerable uncertainty which ordinarily is suffered by an acquiring company. (348A-349A)

Further, Dr. Warner pointed out that Flammia lost the opportunity to acquire Sossner with another company -- this having been usurped by OSG. In addition, Flammia suspended the operations of his own company, The Pioneer Company. However, Dr. Warner did not put a specific valuation on these very real damages. (349A)

Mr. Sternlieb opined that Flammia's services were only worth $22,500 computed as twenty-five percent of the full fee that an investment broker would have charged for handling

a similar acquisition. (423A-428A,527A)

Mr. Sternlieb testified that a fee of $90,000 would have been earned by an investment banker for the following services:

a. a review of the buyer's requirements and objectives;

b. a review of all of the companies in the industry in which the buyer was seeking to make an acquisition;

c. an enumeration of the possible candidates for acquisition based upon available information;

d. contacting potential customers to be acquired;

e. preparation of a detailed memorandum about the acquisition of candidate's business for the buyer; and

f. negotiation of the transaction (459A-61A, 574A-75A).

On cross-examination, Mr. Sternlieb in essence admitted that Mr. Flammia indeed performed each of these same services to the benefit and enrichment of OSG (527A-580A) and the court below concluded that, in fact, Flammia's services were even greater in value than those an investment broker could have performed and valued same at $130,000.

POINT I.

THE FINDINGS OF FACT OF THE TRIAL COURT SHOULD NOT BE DISTURBED.

A. AS TO THE SUFFICIENCY OF THE MEMORANDA

The trial court, after reviewing the judicially admitted documents, stated in its October 6, 1975 memorandum decision (88A):

> "The memoranda indicating that the plaintiff is entitled to relief and the memoranda which take the agreement out of the Statute of Frauds (as in Morris Cohen), are one and the same." (111A)

The documents were discussed and their inter-relationships shown, and the Court concluded:

> "These communications, like those in Morris Cohen, sufficiently identify the seller, identify and establish plaintiff's role in the negotiations, establish the subject matter of the transaction and, most important, acknowledging performance by an obligation to the plaintiff as a consequence of his assistance in arranging for the sale of Sossner." (114A)

B. AS TO THE CREDIBILITY OF THE EXECUTIVES OF OSG

The trial court in its memorandum decision of July 14, 1976 (582A) made certain findings of fact, some of which related to the credibility of OSG's two major factual witnesses:

> "These attempts by OSG's principal officers to minimize the importance and effect of the discussion on May 14, 1973 are neither commendable nor credible."

The Court further discussed the credibility of these principal executives of OSG:

> "Moreover, their credibility was substantially impaired when they denied receipt of plaintiff's "Fiscal Year 1973-74 Forecast" for Sossner. (Ex. 20) on May 14, 1973." (593A)

The Court expressed its credulousness at the testimony of OSG's executive Zoppelt when stating:

> "In an attempt to minimize or negative the services provided by the plaintiff, Mr. Zoppelt testified that neither the real estate, the inventory, the cash, the accounts receivable, the employees, the foremen, or the executive officers of Sossner nor the fact that it was an operating business was important to OSG's agreement upon a purchase price of $2,000,000 or in its decision to buy the company. Only Sossner's good will, name and reputation entered into such decision, according to Mr. Zoppelt." (592A)

C. AS TO LIABILITY

The District Court, in its Findings of Fact set forth certain findings as to liability in its memorandum decision of July 14, 1976 as follows:

> "Insofar as defendant OSG's liability for some damages is concerned, there is really no basis for dispute. At the meeting of May 14, 1973, OSG undeniably requested plaintiff to determine whether Sossner was for sale and in a letter dated May 24, 1973, addressed to the plaintiff, Mr. Zoppelt "thanked" him for (i) his letter of May 17th and (ii) "making the contact at Sossner," and stated that "we look forward to hearing the results of your discussion with him (Mr. Brancato of Sossner) on May 23 or 24."

In Flammia's May 17th letter to OSG which, as indicated, was acknowledged "with thanks", he had written in pertinent part as follows:

"It was a real pleasure to meet and discuss with you and Mr. Zoppelt the possibilities of acquiring Sossner Tool Division by OSG.

"As you know, I spoke to Mr. Leo Brancato, Executive Vice President of Mite Corporation on Monday, May 14, and told him that I had lined up a possible buyer for the Sossner Division but didn't reveal your company identity.

"On Wednesday, May 16th, I spoke to Mr. Brancato again and told him that your company (OSG) was the interested party, after my phone conversation with Mr. Zoppelt on Tuesday afternoon, wherein he authorized me to act in your company's behalf.

* * *

"He did ask for your name and Mr. Zoppelt and I gave the names to him together with your address and telephone number. I imagine that he is going to draw a D & B on your company before he continues any possible negotiations.

"I will keep in touch with Mr. Brancato and if I do not hear from him by Wednesday, May 23rd, I will phone him on Tursday, the 24th."

In the light of the foregoing and the testimony of the plaintiff and Mr. Zoppelt before and at the trial, it ill behooves the defendant OSG now to claim that "plaintiff was (merely) a volunteer and not entitled to compensation as a finder" or otherwise. Indeed such claim in the light of all the facts is unconscionable. (596A-597A)

D. AS TO DAMAGES

After discussing at length the eminent qualifications of plaintiff's expert witness Dean Aaron Warner and the effect of his testimony, the District Court turned its attention to this expert witness and made the following Findings of Fact:

> "Mr. Sternlieb appears to have based this opinion upon the type and amount of work which Lehman Brothers would render to a seller such as Mite in a transaction of this size. For such he testified his firm would receive a fee in the neighborhood of $90,000. He reduced such fee to the twenty to twenty-five thousand figure based upon his opinion of the services rendered by the plaintiff.
>
> This Court cannot escape the impression, however, that Mr. Sternlieb's estimate discounted much that should be due to plaintiff because the members of this firm would have been required to do, and would have performed, various work and services to educate themselves to the level of knowledge and expertise that plaintiff had already attained by working for so many years in the industry, where plaintiff of course did not have to perform these tasks. Moreover, in this particular case it is indisputable that plaintiff had special knowledge of certain facts such as the minimum price for which Sossner could be bought and that Sossner was available for sale. In addition, plaintiff's good faith and confidence in the deal and his opinion that Sossner was such a good acquisition was manifested by the fact that he, the plaintiff, was willing to invest his own money in the same, and this confidence considered with his expertise was helpful to OSG.
>
> Notwithstanding Mr. Sternlieb's doubts with respect thereto, all these factors unquestionably had some value as Professor Warner pointed out.
>
> In any event, plaintiff may not be said to have been an ordinary "finder". His lifetime experience in and knowledge of the industry and, in particular, of the Sossner company which OSG sought to acquire, his prior dealings with the management of Sossner,

and his intimate knowledge of Sossner's strengths and weaknesses were not facts and details which could have been unearthed, set forth and relied upon by an interested purchaser no matter how diligent the services of a prominent investment banking firm such as Lehman Brothers. In other words, plaintiff's knowledge and expertise in this particular matter were unique, were relied upon by the defendants and were of considerably more value than the service which might ordinarily be performed even by such a reputable, well-known firm engaged in the finder business as Lehman Brothers.

Thus the Court concludes that the plaintiff's services were worth substantially more than the value attributed to them by Mr. Sternlieb and indeed were more valuable to a potential buyer such as OSG than the services of the normal finder in a transaction of this kind. Accordingly, the Court finds that on either quantum meruit theory the plaintiff is entitled to recover from OSG damages in the sum of $130,000." (602A-604A)

The case was tried non jury by the District Court. The Court, as finder of fact, heard the testimony of the parties, reviewed the documents stipulated into evidence, made credibility evaluations and made Findings of Fact relative to the essential parts of the case before it. Some of the findings have been set forth above.

These Findings of Fact should not be disturbed.

In an annotation in 111ALR 742, the following principle was enunciated:

> "In 3 Am Jur, Appeal and Error, Section 896, it is said that the trial court is naturally in a better position to pass on the credibility of the witness, and that the appeal court will not, in fact, generally speaking, cannot, set itself as the judge of the credibility of witnesses by weighing evidence even though a preponderence of it against the finding or verdict is apparent. The text continues: "The questions of credibility of witnesses and the weight to be given to their testimony is exclusively within the providence of the trial court; the providence of the appellate court is to determine whether there is <u>any evidence</u> from which the appeal court may have properly drawn its conclusion."....

Accordingly, the Findings of Fact of the trial should not be disturbed.

POINT II.

THE AGREEMENT BETWEEN FLAMMIA AND OSG WAS EVIDENCED BY LETTERS AND MEMORANDA WHICH WERE JUDICIALLY ADMITTED BY DEFENDANT AND WERE SUFFICIENT TO SATISFY THE REQUIREMENTS OF NYGOL Section 5-701(10)

A. THE JUDICIAL ADMISSIONS

After all pre-trial disclosure was completed in this action, plaintiff and defendant made judicial admissions of all of the letters, memoranda and documents considered relevant. These were the documents considered by the District Court in its 10/6/75 memorandum decision and order.

Defendant now argues in its Point I(A) that the District Court improperly relied on some of these judicially admitted documents, to wit: certain letters prepared by plaintiff.

A review of the proceedings had in this litigation and the applicable law will clearly indicate that the District Court was quite proper in considering all documents in evidence and in giving any weight it deemed appropriate to the letters and/or memoranda in evidence.

The question of whether or not the Statute of Frauds was satisfied was raised on a motion for summary judgment pursuant to section 56(b) of the Federal Rules of Civil Procedure on the basis that there was no genuine issue of material fact and that the defendant was entitled to judgment as a matter of law.

In order to lay the factual basis for this motion before the court, plaintiff and defendant stipulated into evidence each of the known relevant memoranda and letters. (18A through 79A of the Joint Appendix)

Wigmore on Evidence discusses the effect of the judicial admissions:

> Section 2594(3). Judicial admissions are usually made by the party's attorney or counsel. It is settled that the general authority to conduct the trial implies the authority to make such admissions.
>
> Section 2588. Theory of Judicial Admissions. An express waiver, made in court or preparatory to trial by the party or his attorney, conceding for the purposes of the trial the truth of some alleged fact, has the effect of a confessory pleading, in that the fact is thereafter to be taken for granted; so that, one party need offer no evidence to prove it and the other is not allowed to disprove it...
>
> Section 2590. Effect of Judicial Admissions. (1) Conclusive upon the party making. The vital feature of a judicial admission is universally conceded to be its conclusiveness upon the party making it, i.e., the prohibition of any further dispute of the fact by him....." Wigmore on Evidence, 3rd Edition)

Having conceded and stipulated each of these documents, letters and memoranda into evidence, the defendant may not now be heard to criticize the court for considering any one of them; in fact, if any of the documents were submitted into evidence for only a specific purpose or if any objection to any part of any document were to be made, the time to make such

objection was at the time of the stipulation or at least at the time of trial.' ... the opponent of the evidence must ask for that instruction; otherwise, he may be supposed to have waived it as unnecessary for his protection." (Wigmore, Section 13).

If counsel is opposed to an item of evidence, he must object if he is to reserve his right to appeal on that ground. "Rules of Evidence not invoked is waived." (Wigmore Section 18)

B. EVEN IF NOT JUDICIALLY ADMITTED, THE DOCUMENTS AND MEMORANDA WOULD HAVE BEEN PROPERLY BE CONSIDERED BY THE DISTRICT COURT

As the District Court discussed and demonstrated in its 10/6/75 memorandum decision, the 5/17/73 letter to OSG by plaintiff was specifically acknowledged in a signed responsive letter from OSG dated May 24, 1973. Thereafter, a memorandum from plaintiff and a signed letter from defendant respectively were exchanged relating to plaintiff's compensation.

These writings were clearly inter-related and refer to the transaction before this Court. Under these circumstances, all of the documents are to be considered as one memorandum for consideration by the trial court.

> "Section 208. Several Writings. The memorandum may consist of several writings if one of the writings is signed and the writings in the circumstances clearly indicate that they relate to the same transaction." (Restatement of Contracts, 2d.)
>
> "The memorandum required by the Statute (of Frauds)

> may be pieced together out of separate writings, some signed and some unsigned, provided they all clearly refer to the same transaction." Crabtree v. Elizabeth Arden Sales Corp., 305 NY 48 110 NE 2d 551. See also 4 Williston Contracts sections 580-584 (3rd edition 1961; 2 Corbin, Contracts sections 512-516 (1950); Notes, 73 ALR 1383 (1931), 85 ALR 1184 (1933), 81 ALR 2d 991 (1962).

C. THE MEMORANDA ARE CLEARLY SUFFICIENT TO SATISFY N.Y.G.O.L. SECTION 5-701(10)

As discussed above (Point I, Sufficiency of the Memorandum), the trial court found the total effect of the memoranda sufficient to satisfy the Statute of Frauds.

> "These communications, like those in Morris Cohen, sufficiently identify the seller, identify and establish plaintiff's role in the negotiations, establish the subject matter of the transaction, and most important, acknowledge performance by an obligation to the plaintiff as a consequence of his assistance in arranging the sale of Sossner." (114A Joint Appendix).

However, defendant contends that nowhere in these documents is there mention "of any employment of Flammia as a finder..." (Appellant's brief page 24).

Appellant further argues that the documents "are completely consistent with what the rest of the evidence discloses..." The rest of the evidence has shown that there was an agreement between OSG and Flammia that Flammia would be compensated by becoming part owner and President of Sossner. Flammia performed the services, OSG was enriched, Flammia was denied his participation in the acquired company by the executives of O.S.G.

There is no dispute that these facts are so. Flammia never intended to act as a finder. His purpose was to be an integral part of the deal.

Since OSG failed to perform its part of the bargain, Flammia was entitled to treat the agreement as rescinded and to sue for the value of the services. Restatement of the Law, Restitution, Section 107 (1) and (2); NYJ Restitution, Sections 10 and 33.

> "Effect of existence of Bargain upon Right to Restitution. (1) A person of full capacity who pursuant to a contract with another, has performed services ... for another .. is not entitled to compensation other than in accordance with the terms of such bargain ... unless the other has failed to perform his part of the bargain. (2) In absence of circumstances indicating otherwise, it is inferred that a person who requests another to perform services for him ... thereby agrees to pay therefor. (Restatement, Restitution, Section 107)
>
> It is the general rule that a contract may be rescinded for substantial non-performance or breach. Breach of a promise in a contract which is substantial and lies at the basis of the entire contract and goes to this entire consideration and affects the parties' entire obligation thereunder, furnishes ample basis for rescision..." (10 NY Jur., Contracts, Section 427)

Flammia's reward was to be a participant in the acquisition of Sossner. His reward was denied him. At trial, Flammia sought to have his services evaluated. To determine the value of Flammia's services to OSG, the Court considered the nature of his acts and the extent to which they benefited OSG.

Plaintiff's acts, viewed as they benefited OSG, were to identify a company for OSG to acquire and to provide all of the information, reassurance and advice necessary to consummate the acquisition. Because of this, defendant, in the course of this action, has continually tried to label Flammia as a "finder". The purpose of this labeling, presumably, has been to invoke the Statute of Frauds as a defense when, in fact, the statute does not apply. (See 28 Fordham Law Review 384, "promise within statute where promisor is independently liable" discussing an analgous situation involving a promise to be another's debt).

Closely in point is the case of Dura v. Walker Hart & Co., 27 NY 2d 346, 318 NYS 2d 289. The Dura case involved an agreement between two finders to pool their efforts and to share the benefits in a business transaction of locating a company for a third party principal. The services were performed for the principal and one of the finders appropriated all of the benefits to himself. The plaintiff finder brought an action against the appropriating finder claiming that the oral agreement as between them was breached and that he was damaged. The unanamous Court of Appeals ruled that that action was not barred by the Statute of Frauds since plaintiff was not suing under the theory of an oral agreement to pay a finder's fee but rather an oral agreement between two finders to perform services for another.

Similarly, in this case, plaintiff does not claim

damages for breach of an oral contract to pay a finder's fee but, rather, claims breach of a contract wherein plaintiff was to be an integral part of an acquisition. Upon breach of the agreement, plaintiff seeks damages in quantum meruit, i.e., the value of the services which were rendered to defendant.

Since a monetary value cannot be placed on the loss of the right to invest in and operate a company, plaintiff sues for damages in quantum meruit and asks for an amount equal to the extent to which his services enriched defendant. As plaintiff's expert, Professor Aaron Warner, stated, the value of these services were: (1) eliminating the need for defendant to employ the services of a finder or investment banker, (2) revealing the precise price for the acquisition, (3) supplying precise data sufficient to eliminate need by defendant to search for a suitable company on the east coast to meet their requirements, (4) the security of the knowledge that Mr. Flammia would personally make a substantial investment in the acquisition, thus eliminating considerable uncertainty to defendant in evaluating the merits of the purchase, (5) Mr. Flammia's forfeiting opportunities to acquire Sossner with another firm and the suspension of his own business during the period of negotiations and acquisition.

Clearly, the Statute of Frauds was never intended to be applied to an agreement as existed between plaintiff and OSG.

POINT III.

THE TESTIMONY OF PLAINTIFF'S EXPERT WITNESS WAS PROPERLY CONSIDERED AND THE AWARD TO THE PLAINTIFF WAS PROPERLY SUPPORTED BY THE EVIDENCE.

A. THE QUALIFICATION OF PLAINTIFF'S EXPERT WITNESS

Defendant argues that the District Court abused its discretion in accepting the testimony from plaintiff's expert, Professor Aaron Warner, as to the value of Flammia's services.

Generally speaking, the first test for the court in determining whether an expert should be permitted to testify is enunciated in Wigmore on Evidence, 3d Edition, section 715(2):

> "Knowledge of Value Standard; what tests are proper? (continued):
> Services Value: The general test, to be gathered from the rulings, is that anyone SUFFICIENTLY FAMILIAR with the commercial value of such services may testify."

Thereafter, the function of the trier of the fact is to give whatever weight such testimony may warrant.

The trial court went in great length setting forth those qualifications of Dean Warner which it considered in its ruling that he should be accepted as an expert valuation witness in this case. (600A Joint Appendix)

It is well settled that there is no requirement that an expert need actually experience the subject of his testimony.

Bratt v. Western Airlines (CCA 10th) 155 F 2d 850 166 ALR1061.

Generally, once the trial court has made a determination to accept the testimony of an expert witness, that ruling is not subject to review on appeal.

In an annotation at 166 ALR 1067, it is provided that:

> The courts are generally agreed that the qualification and competency of one to give opinion evidence as an expert is primarily in the discretion of the trial court, and the admission or exclusion of such testimony on the ground that the witness was or was not qualified to testify will not be reviewed by the appellate court except where such discretion has been abused
>
> as where there is absolutely no evidence that the witness had the qualifications of an expert and his opinion testimony was admitted as that of an expert or
>
> whether in deciding upon the question of his competency the trial court has proceeded upon erroneous legal standards.

In Wigmore on Evidence, 3rd Edition, sections 560 and 561, it is provided that once the qualifications of an expert have been shown:

> "Secondly, and emphatically, the trial court must be left to determine, absolutely and without review, the fact of possession of the required qualification by a particular witness."

Professor Warner was an eminently qualified witness and the court so found.

B. PLAINTIFF IS ENTITLED TO THE MARKET VALUE OF HIS SERVICES AT LEAST TO THE EXTENT THAT THOSE SERVICES ENRICHED DEFENDANT.

(i) The trial court resolved the question of fact of market value of plaintiff's services.

The trial court, as finder of fact, made the following conclusions:

(1) The facts presented a hybrid of quasi-contract and factually implied contract. (598A)

(2) The market value of plaintiff's services is not to be computed by an hourly rate. (598A)

(3) The market value of one's services must consider his skill, expertise, training and knowledge, payment to others for comparable services, value of those services to the recipient, etc. (598A)

(4) That "plaintiff's knowledge and expertise in this particular matter were unique, were relied on by the defendant and were of considerably more value than the services which might ordinarily be performed by such a reputable, well-known business as Lehman Bros. (604A)

(5) That the market value of plaintiff's services were $130,000. (604A)

(ii) The trial court ruled that the distinction between quasi-contract and contract implied in law need not be made since the damages in either case would be the same.

"Further, no case called to our attention indicates that where services have been rendered, the market value of the service can never be identical to the enrichment worked by those services. Indeed, such market value would seem to be under normal circumstances a logical measure of the enrichment. In fact, in the words of one New York authority:

> Value of the services is stated to be the measure of recovery in an action for work, labor and services, whether recovery is had on the basis of contract implied in fact, contract or promise implied by law or quasi-contract, and usually there is no objection to value as to measure of recovery since in most cases involving an implied in fact contract, and also in many cases involving non-consensual obligation, to pay for services, there is an equivalence between the value of the plaintiff's services and the value of the benefit conferred upon the defendant by such services. (50 NY Jur., Restitution and Implied Contracts, section 107 (Footnote omitted)."

(iii) In any event, the proposition of the rule of damages urged by defendant is not supported by defendant's authority.

Defendant seems to argue that to award damages to plaintiff by determining the extent to which defendant was "enriched" will cause a larger award than to grant the "market value" of plaintiff's services.

However, the authorities cited by defendant all state that the enrichment damages can only be the same or less than the market value of a plaintiff's services. (50 NY Jur. section 107 at page 471 citing the Restatement of Law)

Accordingly, if defendant had its way on this point, then the trial court should consider the extent of enrichment to OSG ($130,000) and then consider, in addition, the market value of the services and efforts rendered by plaintiff but which did not directly benefit defendant. Very specifically, under defendant's theory, the trial court should have awarded additional damages for:

(1) The loss of Mr. Flammia's opportunity to acquire Sossner with another company. (601A),

(2) the cessation of plaintiff's business efforts awaiting the acquisition of Sossner "so as not to confuse the possible deal". (27A)

Thus, if a remand is seriously requested by defendant, then plaintiff would request that the issue on the retrial be limited to the question of determining how much in excess of $130,000 should be awarded to plaintiff.

CONCLUSION

The judgment in favor of the plaintiff against the defendant OSG as awarded by the District Court should be affirmed in all respects.

Dated: Lynbrook, New York
November 4, 1976

Respectfully submitted,

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Of Counsel:

PETER K. LEDWITH

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

MURRAY BERMAN, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 55 EAST 10'ST NEW YORK, N.Y.

That on the 12 day of NOVEMBER, 1976, deponent personally served the within BRIEF FOR PLAINTIFF-APPELLEE upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing _____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

CLEARY GOTTLIEB STEEN + HAMILTON
ATTORNEYS FOR DEFENDANT-APPELLANT
ONE STATE STREET PLAZA
NEW YORK, N.Y. 10004

Murray Berman

Sworn to before me this
12th day of November, 1976

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1977